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Supreme Court, U.S.
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No. 97-831

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, et al.

REPLY BRIEF IN SUPPORT OF THE MOTION OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION TO EXPEDITE CONSIDERATION OF THE PETITION FOR CERTIORARI

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1. In their opposition to our motion to expedite consideration of the petition in this case, the nation's largest local carriers make one thing clear: they do not want the Court to hear this case this Term. There is a reason for that. At present, 98% of local telephone revenues still belong to the local monopolists. The longer that respondents succeed in keeping competition out of local markets, the longer they will sustain their monopoly market shares. But immediate competition is what Congress intended, and respondents well know that they would have much to gain from a year's delay in this Court's review. That gain, however, would be the public's loss.

Review this Term is needed to prevent the confusion that would result from an additional year's worth of private agreements negotiated under an erroneous and exceptionally destabilizing legal regime. Unless and until this Court corrects that decision, which invalidates the core of the FCC's national regulatory framework for implementing the 1996 Act, the basic

controversies under the Act will be litigated and relitigated in various federal district courts and courts of appeals rather than resolved in a single administrative proceeding. See Fed. Pet. 22-24. For example, respondents themselves have already challenged state commission pricing determinations in dozens of separate district court proceedings. See Reply Br. in Support of Fed. Pet. 5-6. Each change in the law under that regime -- and there would be many -- would subject numerous private interconnection agreements to a potential need for renegotiation. Delaying consideration of this case until next Term would create another year's worth of agreements negotiated in that climate of uncertainty. Because uncertainty discourages the investment necessary for competition, the only beneficiaries of postponing legal clarity for another year are the incumbent local carriers -- which, in their opposition to our motion, essentially ignore this concern.

2. We have asked this Court to schedule consideration of our petition for the January 23 Conference because, in our view, that course would be the best means of hearing this case during this judicial Term. Respondents, however, contend that it would be unfair -- not to themselves, but to unnamed other parties -- to decide on that date whether this case should be briefed and argued. We disagree. We filed our petition nearly two months ahead of schedule, on November 19, 1997, and responses to it, as well as our reply brief, have now been filed. By January 12 -- 90 days from the final judgment -- the procession of staggered

cross-petitions must run its course, and this Court will know exactly what issues it has been asked to review. We have now filed responses to each of the three separate cross-petitions filed by respondents, and we will respond to any additional cross-petitions with similar expedition. Given the unusual stature and public importance of this case, we do not believe that it would be at all unfair to ask other interested parties to disclose their own views before January 23, more than two months after the filing of our petition.[1]

3. Finally, respondents encourage this Court to postpone review of the petitions until after the Eighth Circuit has ruled on several mandamus petitions "to enforce the court's mandate." See Opp. 6-7. We addressed those mandamus petitions in our petition for certiorari and explained why they should not "delay this Court's disposition of the pressing issues presented in this petition." See Fed. Pet. 11 n.4 (citing Pet. App. 68a). In the various briefs in opposition to certiorari, no party disagreed with that position, and nothing has changed since then other than the scheduling of oral argument in the Eighth Circuit.

The mandamus petitions in the court of appeals involve

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[1] Respondents argue that this Court should delay consideration of this case, not on their own behalf, but because they "understand" that "the States will soon consult among themselves to determine whether and how to respond to the cross-petitions." Opp. 3. We note, moreover, that those cross-petitions are all explicitly conditioned upon a grant of certiorari on the second question presented in our petition, and that, except for California, "the States" have not even opposed certiorari on that question. See Joint Brief for State Commission Respondents and the National Association of Regulatory Utility Commissioners in Opposition, in No. 97-826 et al.

issues arising under 47 U.S.C. 271, which governs the terms under which the Bell Operating Companies may apply to the Federal Communications Commission to enter the interstate long-distance market.[2] Our petition for certiorari addresses separate provisions of the Telecommunications Act of 1996 governing competition in local telephone markets. See 47 U.S.C. 251 et seq. We have challenged, among other things, the Eighth Circuit's ruling that the FCC lacks statutory jurisdiction to implement many of those local competition provisions. The mandamus petitions argue that that aspect of the Eighth Circuit's decision has binding effect on the FCC's dispositions of the Bell Companies' applications to enter the long-distance market under Section 271 -- and that the Eighth Circuit is the appropriate forum to determine what that effect is, even though the District of Columbia Circuit has exclusive jurisdiction to adjudicate denials of all such applications. See 47 U.S.C. 402(b)(9).

The pendency of those mandamus petitions provides no plausible basis for delaying this Court's review of the underlying final judgment, which, if left uncorrected, would have

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[2] In a separate proceeding, a federal district court in Wichita Falls, Texas, recently held that Section 271 is an unconstitutional "bill of attainder" on the theory that it improperly "punishes" the Bell Companies by subjecting them to more regulation than other local telephone companies. See SBC Communications, Inc. v. FCC, Civ. No. 7-97-CV-163-X (N.D. Tex. Dec. 31, 1997). That decision is subject to review in the court of appeals, and, on January 6, 1998, the Solicitor General authorized an appeal. That district court ruling has no bearing on the need for this Court to grant expeditious review of the local competition issues presented in this case, and respondents do not suggest otherwise.

irreversibly binding effects on judicial interpretation of the Act. In particular, the Eighth Circuit's disposition of the mandamus petitions, whenever it may come, could not change the legal basis for the holdings as to which we seek review. Those holdings require prompt correction whether or not the Eighth Circuit seeks to extend their practical effect beyond local telephone markets to proceedings concerning the long-distance market under Section 271.[3]

CONCLUSION

The motion to expedite consideration of the petition should be granted, and the petition should be scheduled for Conference on January 23, 1998.

Respectfully submitted.

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[3] Respondents also ask this Court to hold our petition pending disposition of the recently filed petition in Virginia State Corp. Comm'n v. FCC, No. 97-1072 (filed Dec. 29, 1997). The ordinary procedure, however, is to hold later-filed petitions (if at all) pending disposition of earlier-filed petitions, and respondents present no plausible reason for doing the opposite here.